

FEDERAL CIRCUIT COURT OF AUSTRALIA

ADT16 v MINISTER FOR IMMIGRATION & ANOR

[2017] FCCA 2169

Catchwords:

MIGRATION – Administrative Appeals Tribunal – application for a Protection (Class XA) visa – the Tribunal complied with its obligations under s.424AA – the disclosure that took place gave the applicant a proper opportunity in the course of the review to have a real and meaningful hearing – the Tribunal gave logical and rational reasons that the applicant’s explanation was not a reasonable explanation for providing the bogus document within the meaning of s.91WA – no jurisdictional error identified – amended application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.36, 56, 57, 91WA, 424A, 424AA, 425, 438, 476

Applicant:	ADT16
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 115 of 2016
Judgment of:	Judge Street
Hearing date:	6 September 2017
Date of Last Submission:	6 September 2017
Delivered at:	Sydney
Delivered on:	6 September 2017

REPRESENTATION

Counsel for the Applicant: Mr J Williams on a direct access basis

Solicitors for the Respondents: Mr A Markus
Australian Government Solicitor

ORDERS

- (1) Leave to the applicant to rely upon the amended application filed on 24 August 2017 and dispense with the need for the electronic filing of the same.
- (2) The amended application is dismissed.
- (3) The applicant pay the first respondent's costs fixed in the amount of \$6,825.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 115 of 2016

ADT16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("the Migration Act") in respect of a decision of the Administrative Appeals Tribunal ("the Tribunal") made on 16 December 2015 affirming a decision of the delegate not to grant the applicant a protection visa.
2. The applicant was found to be a citizen of Pakistan and his claims were assessed against that country. The applicant resided at Peshawar from March 2012 until June 2012 and then travelled by air to Malaysia on 19 July 2012 where he remained for one day. The applicant then travelled

to Indonesia on 20 July 2012 where he remained until early August 2012.

3. On 9 August 2012, the applicant entered Australia as an irregular maritime arrival. The applicant applied for protection on 19 December 2012 for a protection visa. The applicant claimed to fear harm from the Taliban and other extremist Islamic groups in Pakistan, given his ethnicity as a Pashtun Turi and his religion being a Shia Muslim.

The delegate's decision

4. On 14 October 2013, the applicant was interviewed by the delegate, and during that interview he provided his passport as well as other documents to the delegate. The delegate subsequently requested, and was then provided with, a document examination report. The forensic examination report of the passport revealed a number of discrepancies.

5. Letters from the delegate dated 5 September 2014

6. *Invitation under s.56 and s.57*

7. By letter dated 5 September 2014, the applicant was invited to provide further information under section 56 and to comment on relevant information under section 57 of the Act.

8. *Notice under s.91W*

9. On 5 September 2014, the applicant was also given a notice under section 91W of the Migration Act. That notice referred to the applicant providing on 14 October 2013 a document claimed to be a genuine passport in support of the protection visa application. The letter relevantly, said:

On consideration of this document by a department Forensic Document Examiner it has been found to be a fraudulently altered document.

10. The notice explained that the document had been retained and attached to the document was a notice of retention of bogus documents.

11. *Notice of retention of bogus documents*

12. The notice invited the applicant to provide further information in relation to the applicant's identity. The notice of retention of bogus documents dated 5 September 2014 made express reference to the passport, identified the passport number and the applicant's name and the date of issue. The letter made reference to consideration of the document by a departmental Forensic Document Examiner and having found that the document was fraudulently altered. Reference was made to that falling within the definition of "bogus document" and that accordingly, the document had been retained.
13. On 2 October 2014, the applicant provided a statement dated 25 September 2014 by way of response denying any knowledge or involvement in alterations having been made to the passport.
14. On 28 October 2014, the delegate made a decision refusing the applicant's application for a protection visa, proceeding on the basis that his identity was as claimed and finding that the applicant did not face serious or significant harm as it would be reasonable in his circumstances to relocate within Pakistan.

The Tribunal's decision

15. On 3 November 2014, the applicant applied for review and attached a copy of the delegate's decision to that application for review.
16. By letter dated 14 August 2015, the applicant was invited to attend a hearing on 10 November 2015. The applicant appeared on that date to give evidence and present arguments. The hearing was adjourned to 16 November 2015 and the applicant appeared to give evidence and present arguments.
17. Following the second hearing, further material was provided by the applicant's migration agent which included detailed submissions dated 14 December 2015 in relation to the fraudulently altered passport. Those submissions referred to a Freedom of Information request for the Document Examination Report and the receiving of a 'Summary of Outcomes', which in substance reflected the substance of what was identified in the notice given to the applicant dated 5 September 2014 and reflected the substance of what was summarised in the delegate's decision of 28 October 2014. The submissions sought to advance that

the applicant lacked an element of fraud or deception and had no intention to mislead or deceive the department. The submissions advanced that the applicant had a reasonable explanation for providing the bogus document.

18. The Tribunal identified the background to the application for the application for review and set out the relevant law. The Tribunal in its reasons identified, taking into account material which included, relevantly, a “Document Examination Report” relating to the applicant’s passport and national identity card. The Tribunal set out in full the applicant’s statement provided in response to the natural justice letter from the Department dated 5 September 2014.
19. Part of that statement refers to the applicant giving his passport to his cousin so that his cousin could give it to the agent and the passport was then given back to the applicant at the airport. The applicant stated that a meeting was arranged by telephone to meet a man at the airport to give him back his passport and he was not sure who he was and that he had no further contact with him. The applicant said that he understood that his passport had been needed to apply for a visa to Malaysia for the applicant. The applicant said that the agent had his passport for about three months. The applicant stated that when he was given back his passport, he checked it in relation to the Malaysian visa and that he thought his passport did not look different and did not suspect that his passport had been altered.
20. The applicant asserted that he did not knowingly provide a ‘Fraudulently altered document’ and that he thought his passport was genuine. The applicant stated he did not know if the Malaysian visa was genuine and if the agent who arranged his travel altered his passport in some way”. The Tribunal referred to the applicant’s evidence at the entry interview.
21. The Tribunal referred to a further statement by the applicant on the 4th of November 2015. The applicant in that statement, made reference to having looked at a colour copy of his passport, and that in early June 2012 he travelled to Malaysia by plane using his passport and that he could see from the colour copy of his passport that there was a stamp from 3 June 2012. The applicant mentioned that he had been deported by the Malaysian authorities and that he recalled his passport being

stamped, which may have been on 3 June 2012. The applicant said he was not sure why he was deported. The applicant identified that he arrived in Malaysia on one day and was deported the next day.

22. The applicant alleged that some weeks later, he travelled to Malaysia by plane using his passport, and that there are two stamps in his passport around his time – one on 18 June 2012 and one on 19 June 2012. The applicant alleged that when he left Pakistan, his passport was stamped which may have been on 18 June 2012. The applicant also alleged that when he arrived in Malaysia, his passport was stamped which may have been on 19 June 2012.
23. The applicant made reference to there being other date stamps in the passport – one dated 25 April 2012 and one dated 24 July 2012, and that the applicant believes these may relate to his Malaysia visa which expired after three months. The applicant maintained that he continued to rely upon his earlier statement as to how he obtained both his passport and his Malaysian visa.
24. At the hearing, the Tribunal asked the applicant how the applicant obtained his passport, and the applicant explained that he had attended a passport office and that the passport was then sent to him by post.
25. The Tribunal then explored with the applicant how he obtained his Malaysian visa. The applicant stated that he gave his passport to his cousin, who passed it on to an agent. The applicant confirmed that he did not deal directly with the agent and that the agent arranged the visa. Further, the applicant stated that it was after three months that the agent gave the passport back to the applicant's cousin, who the applicant said passed it to the applicant.
26. The Tribunal then asked the applicant whether he signed any forms such as an application form for a visa to visit Malaysia, and the applicant said he did not, and he did not do anything else.
27. The Tribunal asked the applicant whether he was expecting to be issued with a legitimate Malaysian visa, and the applicant asserted that he believed the visa was genuine. The Tribunal asked the applicant how he expected to obtain a legitimate Malaysian visa without signing any forms and the applicant stated he did not understand the process that he

dealt with an agent. Further, the applicant stated that he did not know how the agent did it and whether he had to sign forms or not.

28. The Tribunal, consistent with s.424AA of the Migration Act put to the applicant information obtained from the Department's Document Examination Report as follows:

- *Unnumbered page 1 and page 2, along with corresponding pages 35 and 36, of the applicant's passport were printed on an inkjet printer and were missing security features;*
- *pages 9 and 10, along with pages 27 and 28, of the applicant's passport were perforated with the number "A5399307" whereas the remaining pages of the passport were perforated with the number "b4829106".*

29. The Tribunal explained that this information was relevant to the review as it suggested the applicant's passport was bogus and that it was altered by a person who did not have authority to do so.

30. The Tribunal made reference to the requirements of s.91WA of the Migration Act and that the Tribunal must refuse to grant a protection visa if the applicant provides a bogus document as evidence of his identity and, amongst other things, does not have a reasonable explanation for providing the bogus document. The Tribunal invited the applicant to comment and advised that he was entitled to request further time to comment if he wished.

31. Consideration of whether the application should be refused under s.91WA

32. The Tribunal then turned to consider whether or not the applicant's application for protection visa was required to be refused under s.91WA of the Migration Act on the basis that the applicant provided bogus document to the Department. The Tribunal accepted that the passport was legitimately issued by the Pakistani authorities.

33. The Tribunal provided that the passport provided to the Department by the applicant was altered by a person who did not have authority to do so as contemplated by paragraph (b) of the definition of 'bogus document', and that such a document is a 'bogus document' for the purposes of s.5(1) of the Migration Act. The Tribunal found that the

applicant had provided the documentary evidence of his identity, nationality or citizenship for the purposes of s.91WA(2)(b)(i) of the Migration Act.

34. The Tribunal turned to the issue of reasonable explanation for providing the bogus document. The Tribunal took into account that the applicant engaged an agent to obtain documentation which would enable him to enter Malaysia. The Tribunal found that the applicant's lack of participation in the visa application process was one whereby the applicant must have known that the visa would not be regularly issued. The Tribunal found that even if the applicant was not explicitly aware of the alterations made to his passport, he must nevertheless have been aware that the agent would have had to alter his passport to facilitate the inclusion of his irregular visa. The Tribunal did not accept that the alterations were an "innocent, unintended or accidental matter". The Tribunal found the explanation given by the applicant at the hearing to be unreasonable. The Tribunal found the applicant does not have a reasonable explanation for providing a bogus document.
35. The Tribunal was satisfied that the applicant has presented a bogus document, being a passport, as evidence of his nationality or citizenship. The Tribunal is satisfied that the applicant has provided evidence of his Pakistani nationality and citizenship. The Tribunal was not satisfied the applicant has a reasonable explanation for providing a bogus document to the Department.
36. The Tribunal accordingly found, consistent with s.91WA of the Migration Act that the Tribunal must affirm the decision to refuse to grant the applicant protection visa.

Before this Court

37. The grounds in the amended application are as follows:

Ground 1: The Secretary failed to follow procedures required by law pursuant to section 438(2)(a) of the Migration Act 1958 (Cth)

I. The Secretary did not follow procedures required by law pursuant to section 438(2)(a) of the Migration Act 1958 (Cth) by failing to issue a certificate of non-disclosure of information with regard to the departmental forensic examination report of the applicant's Pakistani passport which was found to be "bogus" for

the purposes of section 91WA of the Migration Act 1958 (Cth), resulting in the refusal of the applicant's protection visa.

Particulars

Protection claims

a) The applicant is a twenty five year old male citizen of Islamic Republic of Pakistan, (Pakistan) who claims protection in the Commonwealth of Australia (Australia) on the grounds that he faces a real risk of harm from the Taliban because he is a Shi a Muslim and Turi Pashtun from the Kurram Agency, Parachinar in Pakistan.

The finding by the Tribunal under section 91WA of the Migration Act 1958 (Cth)

b) On 16 December 2015, the Tribunal affirmed the decision by the delegate to refuse the protection visa on the grounds that the applicant did not provide a reasonable explanation for the provision of a bogus document to the Department of Immigration and Border Protection (DIBP) in the form of a fraudulent Pakistani passport pursuant to section 91 WA of the Migration Act 1958 (Cth).

The applicant's passport

c) At page 92 of the Court Book, on 14 October 2013, the applicant provided an Islamic Republic of Pakistan passport number TZ6899521, in the name of the applicant, issued on 24 August 2011.

The non disclosure of the passport examination request by the delegate under public interest immunity

d) At document number six of the Court Book, on 22 November 2013, a delegate to the Minister made a document examination request form regarding the applicant's passport. It is listed but not reproduced and is marked "N/R". At page 6 of the index to the Court Book, the symbol "*" denotes "documents contain information disclosure of which is considered to be contrary to the public interest".*

The non-disclosure of the passport examination report by the departmental Forensic Document Examiner under public interest immunity

e) At document number eight of the Court Book, on 28 April 2014, a departmental Forensic Document Examiner submitted the document examination report to the delegate to the Minister. It is listed but not reproduced and is marked "N/R". At page 6 of the index to the Court Book, the symbol "*" denotes "documents contain information disclosure of which is considered to be contrary to the public interest."*

Email by Andras Markus with "Disclosure Decision Checklist" dated 28 July 2017

f) On 28 July 2017, the applicant received an email from Andras Markus, employed as a solicitor of the Australian Government Solicitor, who is acting for the Minister for Immigration and Border Protection in this matter, which attached a copy of the "Disclosure Decision Checklist", confirming that there were no certificates under section 438 or section 437 of the Migration Act 1958 (Cth) issued in this matter.

Email by Dale Watson dated 23 August 2017

g) On 23 August 2017, the applicant received an email from Dale Watson, employed as a solicitor of the Australian Government Solicitor, who is acting for the Minister for Immigration and Border Protection in this matter, which confirmed:

i) that whilst there were "no certificates issued under s 437 or 438 of them Migration Act";

ii) the document examination request dated 22 November 2013 and the document examination report dated 28 April 2014 by the departmental Forensic Document Examiner regarding my Pakistani passport were not reproduced in the court book due to the Minister's "instructions that the disclosure of these documents would be contrary to the public interest."

Section 438(2)(a) of the Migration Act 1958 (Cth)

h) Pursuant to section 438(2)(a), to be in compliance with a requirement under the Migration Act 1958 (Cth), the Secretary must notify the Tribunal in writing that this section applies in relation to the document or information. However, no section 38 certificate was issued in relation to these documents and the Secretary failed to comply as required, with section 438(2)(a) of Migration Act 1958 (Cth), giving rise to reviewable error.

Ground 2: The applicant was denied the applicant procedural fairness pursuant to section 424A, 424AA or 425 of the Migration Act 1958 (Cth) with regard to the nondisclosure of information

2. The applicant was denied procedural fairness pursuant to section 424A, 424AA or 425 of the Migration Act 1958 (Cth) by the non-disclosure of information with regard to the departmental forensic examination report of the applicant's Pakistani passport which was found to be "bogus" for the purposes of section 91W A of the Migration Act 1958 (Cth), resulting in the refusal of the applicant's protection visa.

Particulars

Invitation for further information under section 56 of the Migration Act 1958 (Cth)

a) At page 166 of the Court Book, a delegate to the Minister sent a letter to the applicant, dated 5 September 2014, inviting the applicant to provide further information under section 56 of the Migration Act 1958 (Cth) with regard to the passport examination report and that 'this fraudulently altered document ... casts significant doubt as to the credibility of your claimed identity' and 'this adverse information could form the reason or part of the reason as to an adverse finding on your PV application'.

b) However, given there was no section 438 certificate produced as required by law, there was no lawful reason for DIBP to withhold the examination report from the applicant. The decision to withhold the examination report by DIBP precluded the applicant from making full and proper submissions, in denial of procedural fairness, pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958.

Notice under section 91W of the Migration Act 1958

c) At page 169 of the Court Book, a delegate to the Minister sent a notice under section 91 W of the Migration Act 1958 (Cth), dated 5 September 2014, requesting further documentary evidence in support of the claimed identity and if the delegate did not "find the explanation reasonable, an adverse inference may be drawn."

d) However, given there was no section 438 certificate produced as required by law, there was no lawful reason for DIBP to withhold the examination report from the applicant. The decision to withhold the examination report by DIBP precluded the applicant from making full and proper submissions, in denial of

procedural fairness, pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958.

Notice of retention of bogus documents under section 97 of the Migration Act 1958 (Cth)

e) At page 172 of the Court Book, a delegate to the Minister sent the applicant a notice of retention of bogus documents under section 97 of the Migration Act 1958 (Cth), dated 5 September 2014, stating that “document meets the definition of “bogus document” and that the applicant's passport has been “retained by the department and will not be returned” to the applicant.

f) However, (i) the finding that the document was “bogus” was made before the applicant had any opportunity to respond; (ii) no section 438 certificate was produced as required by law, (iii) nor was the examination report provided to the applicant to enable the applicant to make full and proper submissions; and (iv) the retention of the applicant's passport by DIBP, precluded the applicant of an opportunity to have his passport independently tested and verified, in denial of procedural fairness pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958. The applicant's statement in response to the invitation under section 56 of the Migration Act 1958 (Cth)

g) At page 17 6, the applicant provided a statement, dated 25 September 2014, in response to the invitation under section 56 of the Migration Act 1958 (Cth). The statement is reproduced at [11] of the decision record. In particular, from [2]-[4] of the statement, the applicant provides a reasonable explanation regarding his passport.

[2] At my interview on the 14 October 2013 I gave my Pakistani Passport to the case officer. I believed then and continue to believe that the passport I provided was a genuine passport. I attended in person at the passport office in Kohart. It was a difficult journey to get to Kohart but I made the trip because you have to make an application for a passport in person because you have to provide fingerprints and a photograph. I provided my address on the application and the passport was sent to me by post.

[3] My departure from Pakistan was organised with the help of my cousin, Shabir Hussain Sajdi. I left money with cousin and he paid the agent when I got to Indonesia. The only contact I had with the agent that organised my travel was by telephone. I gave my passport to my cousin and he gave my passport to the agent.

The passport was given back to me at the airport. It was arranged by telephone that I was to meet a man at the airport and gave me back my passport I am not sure who he was and I have had no further contact with him. I understood that the agent needed my passport to apply for a visa to Malaysia for me. The agent had my passport for about 3 months. When the passport was given back to me I recall that checked the Malaysian visa and the page with my photo and details. My passport did not look different other than the new visa and I did not suspect that passport had been altered in any way.

[4] I did not knowingly provide the Department of Immigration with a "fraudulently altered document". I believe my passport is genuine because [applied for it myself. I do not know if the Malaysian visa is genuine. I do not know if the agent who arranged by travel altered my passport in some way. Further statement by the applicant, dated 4 November 2015

h) At page 279 of the Court Book, the applicant provided a further statement to the Tribunal, dated 4 November 2015. At page 281 of the Court Book under the heading "My passport and prior travel", from [19]-[25] of the statement, the applicant provides a reasonable explanation regarding his passport. In particular the applicant stated:

[20]: I was surprised and confused by this assessment. I believe my passport was genuine. The Department of Immigration did not inform me why it was decided that my passport had been altered.

[21]: I have asked the Department of Immigration for my passports back, so that I can look at it closely to find out what is wrong with it. But I'm told that the Department of Immigration will keep it because it has been assessed to have been "fraudulently altered."

i) Given the decision by DIBP to withhold the examination report and to retain the applicant's passport, the applicant was precluded of an opportunity to make full and proper submissions or to have his passport independently tested and verified, in denial of procedural fairness, pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958.

Post hearing submission by the Refugee and Immigration Legal Centre Inc

j) At page 358 of the Court Book, the solicitor for the applicant provided a post hearing submission to the Tribunal, dated 14

December 2015. Under the heading “Fraudulently altered passport”, the solicitor stated:

We made a Freedom of Information request for the 28 April 2014 Document Examination Report of the Documentation Examination Unit within the Department of Immigration & Border Protection.

However, we only received the 'Summary of Outcomes', as the remainder of the Report was redacted under section 37(2)(b) of the Migration Act 1958 (Cth). The Document Examination Report notes, 'only information contained within this Summary of Outcomes is releasable to the client or their representative.' The 'Summary of Outcomes' in the Document Examination Report states that Mr Hussain's Pakaistani 'passport has been subjected to substantial tampering' and was found to be a 'fraudulently altered document.' Importantly, the report also noted that Mr Hussain's National Identity Card 'contains the security features expected, with no evidence of tampering.'

k) Given the applicant only had access to the “Summary of Outcomes,” the applicant was precluded of an opportunity to make full and proper submissions regarding the complete report, constituting a denial of procedural fairness, pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958.

The Tribunal's findings

1) At [18] of the decision record, the Tribunal observed:

The Tribunal put to the applicant, using the procedure in s.424AA of the Act, the following information from the Department's Document Examination Report:

- unnumbered page 1 and page 2, along with corresponding pages 35 and 36, of the applicant's passport were printed on an inkjet printer and were missing security features;*
- pages 9 and 10, along with pages 27 and 28, of the applicant's passport were perforated with the number “A5399307”, whereas the remaining pages of the passport were perforated with the number “B4829106”.*

m) The departmental Forensic Document Examination report dated 28 April 2014 was central to finding by the Tribunal at [33], the Tribunal found that the passport provided to the Department by the applicant was altered by a person who did not have authority to do so as contemplated by paragraph (b) of the

definition of 'bogus document' and that such a document is a 'bogus document' for the purposes of that definition in s.5(1) of the Act.

a) Further, the departmental Forensic Document Examination report dated 28 April 2014 was central to finding by the Tribunal at [44] that the applicant did not have a reasonable explanation for providing a bogus document.

n) However, given (i) the finding that the document was “bogus” was made before the applicant had any opportunity to respond; (ii) no section 438 certificate was produced as required by law, (iii) nor was the full examination report provided to the applicant to enable the applicant to make full and proper submissions, and (iv) the retention of the applicant's passport by DIBP, precluded an opportunity for the applicant to have his passport independently tested and verified, the applicant was denied procedural fairness pursuant to section 424A, section 424AA or section 425 of the Migration Act 1958.

Ground 3: There was an insufficient lack of intention by the applicant to mislead or deceive the Tribunal to satisfy the elements of fraud or deception, resulting in the misapplication of section 91 WA(1) of the Migration Act 1958 (Cth)

3. Given the applicant provided both his passport and his national identity card at [45], there was an insufficient lack of intention on the part of the applicant for the Tribunal to find that he misled or deceived the Tribunal as found at [46]. The conduct of the applicant with regard to production of the Malaysian visa did not relate to the applicant's identity, nationality or citizenship for the purposes of the protection visa application. The applicant's conduct therefore did not fall within the terms of section 91WA(1) of the Migration Act 1958 (Cth), giving rise to reviewable error.

Particulars

Applicable law- section 91WA(1) of the Migration Act 1958 (Cth)

a) Section 91WA(1)(a) of the Migration Act 1958 (Cth) requires the Minister to refuse to grant a protection visa to an applicant, “if the Minister is satisfied the applicant has destroyed or disposed, or caused the destruction or disposal of, documentary evidence of their identity, nationality or citizenship.”

Section 5(1)-definition of bogus document

b) Section 5(1) defines “bogus document”, to mean a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly

Section 91WA(2) of the Migration Act 1958 (Cth)

c) Section 91WA(2) of the Migration Act 1958 (Cth) provides that the refusal requirement will not apply if the applicant: first, has a reasonable explanation for providing the bogus document and either provides relevant documentary evidence of his identity, nationality or citizenship or has taken reasonable steps to provide such evidence.

The Tribunal's findings

d) At [33], the Tribunal found that the passport provided to the Department by the applicant was altered by a person who did not have authority to do so as contemplated by paragraph

(b) of the definition of 'bogus document' and that such a document is a 'bogus document' for the purposes of that definition in s.5(1) of the Act.

e) The Tribunal found at [36] that whilst the applicant has provided documentary evidence of his identity, nationality or citizenship for the purposes of s.91WA(2)(b)(i) of the Migration Act 1958 (Cth), the Tribunal found at [44] that the applicant did not provide a “reasonable explanation” regarding his passport and therefore refused the grant of the protection visa.

Insufficient intention to satisfy the elements of fraud or deception

f) An element of fraud or deception is necessary in order to attract the operation of section 91WA(1)(a) of the Migration Act 1958 (Cth).

g) The requisite element of fraud or deception must relate to the applicant's identity, nationality or citizenship for the purposes of the protection visa application.

h) The applicant provided both his passport and his national identity card. Within the applicant's passport there was found to be a fraudulent Malaysian visa. There was no element of fraud or deception with regard to the applicant's identity, nationality or citizenship for the purposes of the protection visa application.

i) The applicant's conduct therefore did not fall within the terms of section 91WA(1) of the Migration Act 1958 (Cth), giving rise to reviewable error.

Ground 4: There was an insufficient logical or evidentiary basis for the Tribunal's finding that the applicant's explanation for the bogus document was "unreasonable" resulting in the misapplication of section 91 W A(l) of the Migration Act 1958 (Cth)

4. The Tribunal's decision was affected by jurisdictional error as there was insufficient logical or evidentiary basis for the Tribunal to find the applicant's explanation for the provision of the bogus document in the form of his Pakistan passport was "unreasonable" at [44] of the decision record after finding at [33] that the passport provided to the DIBP by the applicant was "altered by a person who did not have authority to do so". The Tribunal therefore misinterpreted, misunderstood or misapplied section 91WA(1) of the Migration Act 1958 (Cth), which precluded the grant of the protection visa to the applicant.

Particulars

The finding by the Tribunal that the applicant provided a bogus document

a) At [33], the Tribunal found that the "passport provided to the Department by the applicant was altered by a person who did not have authority to do so as contemplated by paragraph

(b) of the definition of 'bogus document' and that such a document is a 'bogus document' for the purposes of that definition in s.5(1) of the Act."

The finding by the Tribunal that the applicant provided documentary evidence of his identity, nationality or citizenship

b) At [36], "[h]aving regard to the documentary evidence provided by the applicant in relation to his Pakistani citizenship, the Tribunal [found] that the applicant has provided documentary evidence of his identity, nationality or citizenship for the purposes of s.91 WA(2)(b)(i) of the Migration Act 1958 (Cth)."

The applicant provided to the Tribunal a reasonable explanation for the bogus document

c) At page 176, the applicant provided a statement, dated 25 September 2014, in response to the invitation under section 56 of the Migration Act 1958 (Cth). The statement is reproduced at [11] of the decision record. In particular, from [2]-[4] of the statement, the applicant provides a reasonable explanation regarding his passport.

d) At page 279 of the Court Book, the applicant provided a further statement to the Tribunal, dated 4 November 2015. At page 281 of the Court Book under the heading "My passport and prior travel", from [19]-[25] of the statement, the applicant provides a reasonable explanation regarding his passport

e) At [38] of the decision record, the applicant provided a reasonable explanation that "he was not aware of any alterations to the passport as he provided the passport to the agent for the purposes of obtaining a Malaysian visa. The applicant did not sign an application for a Malaysian visa. The applicant's was deported from Malaysia, and he returned the passport to the agent before attempting to travel to Malaysia a second time."

f) There was therefore an insufficient logical or evidentiary basis for to "reject" the applicant's explanation at [39] that "he left the application for a Malaysian visa to the agent".

g) Further, the Tribunal erred at [43], that "it would have been reasonable for him to attempt to obtain a visa through the regular channels before resorting to fraud ... and that '[h]is failure to do so is unreasonable."

h) As a result, at [44], the Tribunal erred by finding that the "applicant does not have a reasonable explanation for providing a bogus document".

i) Moreover, the Tribunal erred at [46], by finding that s.91WA(1) of the Migration Act 1958 (Cth) applies to the applicant and that, accordingly, grant of a protection visa is precluded by s.91 WA of the Migration Act 1958 (Cth)".

j) Given the Tribunal found at [33] that the "visa was altered by a person who did not have authority to do so", it was open to the Tribunal to find that the applicant was not aware of any alterations and that his explanation was reasonable in the circumstances, giving rise to reviewable error.

Consideration

38. Ground 1

39. In relation to ground 1, Mr Williams of counsel argued that the Tribunal should have followed the procedure identified in s.438 of the Migration Act to issue a certificate in respect of the documents the subject of the claim of public interest immunity, relevantly being the Forensic Department Examiner Report which was identified by the delegate.
40. Mr Williams of counsel submitted that the failure to issue a s.438 certificate meant that there was a departure from the statutory process that constituted a jurisdictional error. Section 438 of the Migration Act identifies a procedure as a matter of discretion that can be followed. There was no challenge to the claim for public interest immunity in respect of the report in the present case.
41. Mr Williams of counsel was given the opportunity to identify whether or not he was advancing any such claim, and maintained that he accepted that the document was the subject of a proper claim for public interest immunity. The substance of Mr Williams' argument was that the failure to issue a certificate under s.438 of the Migration Act meant that part of the statutory procedure for the review had not been followed and that accordingly, the applicant had lost the opportunity of seeking to have disclosed the certificate, seeking to challenge the certificate, and/or seeking access to the documents.
42. It is apparent from the time of the notice of 5 September 2014, that the applicant was on notice of the existence of the Report quite apart from it being identified in the delegate's reasons. It was also identified as Mr Markus, the solicitor for the first respondent pointed out, in the asterisk to the Court book filed by the first respondent on 5 February 2016.
43. I do not accept that the Department was required to give a certificate under s.438 of the Migration Act in respect of the document in the present case. The existence of the document was up in lights and was the basis upon which the applicant responded by his statement and put on submissions dealing in detail with the substance of the allegations in relation to the bogus document. The applicant also took steps under the

Freedom of Information Act 1982 (Cth) to seek access to the document. It is apparent from the applicant's statement that the applicant was well alive to the Malaysian visa aspect of the bogus document, because that was addressed both in his statement and in his written submissions.

44. Even if a requirement of Division 7 of Part 7 of the Migration Act found that a s.438 certificate should issue in respect of documents the subject of a claim for public interest immunity where such record is given to the Tribunal, it has not in the present case given rise to any practical injustice. The substance of the Report was disclosed to the applicant at the time of the hearing before the delegate and by the notice that was provided to the applicant date 5 September 2014, as well as during the hearing in which the Tribunal complied with the requirements of s.424AA of the Migration Act, insofar as any obligation under s.424AA was enlivened.
45. On the face of the material before the Court, the applicant provided a copy of the delegate's decision with the application for review and on one view, no obligation under s.424AA of the Migration Act arose. In any event, to the extent relevant, the Tribunal made sufficient disclosure during the course of the hearing to comply with the obligations under s.424AA of the Migration Act if any such obligation was enlivened.
46. The disclosure that took place gave the applicant a proper opportunity in the course of the review to have a real and meaningful hearing. The process adopted by the Tribunal complied with the obligations of procedural fairness. I am satisfied that, even if there was any error in compliance with Part 7, the applicant suffered no practical injustice and accordingly no jurisdictional error is made out by ground 1.
47. **Ground 2**
48. In relation to ground 2, for the reasons already given, it is apparent that the Tribunal complied with the requirements of s.424AA of the Migration Act insofar as they were enlivened. On one view, adequate particulars had already been given in relation to the Report by the notice and also were contained in the Delegate's decision. In any event, no argument was identified explaining why s.424AA of the Migration Act failed to provide sufficient particulars beyond Mr Williams of

counsel contending that the full document might have provided the applicant. That is not what s.424A or s.424AA of the Migration Act requires.

49. I do not accept that inadequate particulars of the relevant document were given to the applicant. I find that the applicant was given sufficient particulars of the forensic report to meaningfully and properly participate in the hearing. There was no breach of s.424A, s.424AA or s.425 of the Migration Act. Ground 2 fails to make out any jurisdictional error.

50. Ground 3

51. In relation to ground 3, Mr Williams of counsel submitted that there is a requirement of fraud or deception by the applicant that must be found under s.91WA of the Migration Act. Such an implication does not sit with the provision as a whole and in particular, the ability of the applicant to proffer a reasonable explanation. No such intent to mislead or deceive is required under s.91WA of the Migration Act. No fraud or dishonesty is required under s.91WA of the Migration Act. Ground 3 fails to make out any jurisdictional error.

52. Ground 4

53. In relation to ground 4, the Tribunal gave logical and rational reasons for the finding that the applicant's explanation was not a reasonable explanation for providing the bogus document within the meaning of s.91WA of the Migration Act. That finding was open on the material before the Tribunal. No jurisdictional error was made out by ground 4.

Conclusion

54. As the application fails to make out any jurisdictional error, the amended application is dismissed.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 29 September 2017